

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 2146 of 2004

WITH

CRIMINAL MISC. APPLICATION NO 11524 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

KISHAN @ KESH FULABHAI VAGHRI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 2146 of 2004
MR MP SHAH for Appellant No.
MS. KRUTI M SHAH for Appellant No.
MR RC KODEKAR, APP for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 27/01/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The Misc. Criminal Application has been filed under section 389 of the Code of Criminal Procedure [for short 'Cr. P.C.'] praying for suspension of the execution of the substantive sentence imposed upon the applicant/appellant and to release him on bail pending final disposal of the appeal. He has been convicted for offence under section 302 of the Indian Penal Code [for short 'IPC'] and sentenced to suffer rigorous imprisonment for life by the Joint District judge & Addl. Sessions Judge, 4th Fast Track Court, Surat in Sessions Case No. 106 of 2000 dated 26/10/2004.

1.1. While hearing Miss Kruti Shah, learned advocate for the applicant on the question of bail, it appeared to us that the conclusion drawn by the trial Court with regard to offence under section 302 of the IPC was prima-facie erroneous. Hence, we called for the R & P from the trial Court and with the consent of the learned advocates for the applicant as well as for the State we have taken up this appeal for final hearing today. This is more particularly when Miss Shah has not challenged the involvement of the appellant in the incident, but has made submissions only on the question of nature of offence alleged to have been committed by him and the quantum of sentence.

2. According to the prosecution, the incident in question took place on 5/11/1997. On that day the deceased, who is also the complainant of this case, alongwith his brother-in-law Raghunandan and uncle Jaynandan, was sitting on the Ota of his house after having meals at about 8.30 p.m., at that time the present appellant came there and demanded match-box from them. The complainant told him that he did not have any match-box. The appellant, therefore, got excited and he started uttering filthy abuses. All of them, thereafter, told the appellant that he should not speak abuses and should leave the place since they did not have any match-box. The appellant got enraged. He brought out a knife from his pocket and inflicted a blow just below the left side nipple and caused injury. Everybody present there started shouting. The appellant, thereafter, ran away from the place. On hearing the shouts, the brother-in-law of the complainant Bansilal and his sister Prabhavati and others rushed to the spot. The injured was immediately removed to the hospital in a rickshaw.

Considering his serious condition the hospital authorities admitted him as an indoor patient and commenced the treatment. The complainant was fully conscious during his treatment. Upon noticing a medicolegal case, the Medical Officer informed the police and Police Sub Inspector, Pandesara, visited the injured and recorded his complaint, which is at Exh. 32 on record. On receiving the complaint, the police commenced usual investigation during which it drew the inquest panchnama, panchnama of the scene of offence, also recorded the statements of persons conversant with the facts of the case, etc. The offence at that time was registered under section 326 read with section 504 of the IPC. The deceased, however, expired on 9th November, 1997. Due intimation thereof was given to the police and the offence was converted from 326 to 302 of the IPC by the police. On completion of the investigation, the charge-sheet was submitted in the Court of Ld. Magistrate, Surat, who in turn committed the case to the Court of Sessions, as offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

2.1. At the trial, the learned Judge framed the charge for offence under section 302 of the IPC on 20/05/2004 which is at Exh. 7. The appellant pleaded not guilty to the charge and claimed to be tried.

2.2. In support of its case the prosecution examined 12 witnesses and also produced documentary evidence. At the end of recording of the evidence Learned Judge recorded the further statement of the appellant under section 313 of the Cr.P.C. But no specific defence was pleaded by him. His defence was that of general denial.

2.3. At the end of the trial, learned Judge came to the conclusion that the prosecution had established its case against the appellant beyond any reasonable doubt and he convicted him for committing offence under section 302 of the IPC and imposed sentence as stated above. It is this judgment and order of conviction and sentence which are in challenge before us in this appeal.

3. As already stated above Miss Shah has not challenged the involvement of the appellant in the incident. She has, however, submitted that considering the facts and circumstances of the case, this is not an offence under section 302 of the IPC but at best, it can be an offence under section 304 Part-II of the IPC. According to her, there was an altercation and all of a sudden the appellant brought out knife and inflicted only one blow. He has thereafter gone away. The injury

caused to him was not fatal, but the deceased had died due to septicemia. In her submission, therefore, the finding given by the trial Court is absolutely erroneous.

3.1. As against that, Mr R C Kodekar, Ld. APP for the State has supported the judgment fully and has submitted that the appellant had come all prepared at the scene of offence and for trivial reason he has inflicted fatal blow to the deceased. His intention to cause death of deceased is very clear and hence the offence is under section 302 of the IPC and not under section 304 Part-II.

4. We have carefully considered the record and proceedings of the case and also judgment of the trial Court and the rival submissions with a view to reappraise the evidence on record. Miss Shah has not challenged the involvement of the appellant. However, we have on our own scrutinised the evidence from this angle also. The evidence of Jaynandan Ramnath P.W. 4 Exh. 16 and Bansilal Raghunath P.W. 5 Exh. 17, who are the eye witnesses to the incident, clearly shows that on the night of the incident the appellant had been to the deceased and these two witnesses, when they were sitting on the Ota of the house and demanded match-box. Since they did not have any match-box, they told the appellant that they did not have the match-box. He, therefore, started abusing them. The deceased and others requested him to go away from there, but instead of leaving the place, he got enraged and inflicted a blow on the deceased with knife causing him injury just below the left nipple. He thereafter, left the place since hue and cry was raised by these witnesses. In the cross-examination by the defence though they have stated that they were inside the house when the incident took place, in their examination-in-chief it is clearly stated that they have seen the incident. Thus they do not deny their presence at the scene of offence when the incident took place. Therefore, there is no reason to disbelieve their version, given in the examination-in-chief. In our opinion, the prosecution has amply proved the involvement of the appellant in the incident.

5. The next question that is to be decided is what offence he has committed. To appreciate this issue it would be first necessary to refer to the complaint given by the deceased himself. It shows that while they were sitting on the Ota the appellant came there and demanded match-box. Since he did not have any match-box, he showed his inability to give it. The appellant, therefore, got excited and started abusing them. He was asked to leave the place by the deceased and others, but

he refused to do so; instead he brought out knife and caused injury to the deceased. The complaint further shows that even according to the victim himself, the appellant had inflicted one blow just below the left nipple with the knife. He had thereafter gone away. The other eye witnesses' evidence shows that according to them injuries were caused on the stomach region with knife. Upon receipt of the information, the police has drawn inquest panchnama, which also indicates one injury having been found on the person of the deceased. Thus, there are reasonable grounds to hold, on the strength of oral evidence of the eye witnesses as well as the complaint and the inquest panchnama that only one blow was inflicted by the appellant. So far the medical evidence on this aspect is concerned, it is rather unfortunate that the Medical Officer, who upon admission of the deceased in the hospital treated him, is not examined nor medical record of the deceased which was prepared by the said hospital during his treatment has not been brought on record. It is a matter of surprise that said doctor has not even been cited as a witness for the prosecution. It appears to us, considering the post mortem examination notes and the evidence of doctor, who performed the post mortem, the evidence of Medical Officer who treated him at New Civil Hospital, Surat, would have been the best witnesses to say or depose how many injuries were caused to the deceased. It may be stated here that this issue is slightly controversial because according to the oral evidence only one blow was given, whereas during post mortem examination, injury below the left nipple is found and also injury on the stomach causing internal damage to the diaphragm, etc. is found. So far oral evidence is concerned, the complainant's say is that any one blow was given to him below the left nipple; whereas other witnesses' say is that the knife was inflicted to cause injury on the stomach. The oral evidence is, therefore, not very clear whether one blow or more than one blow have been given. The Medical Officer, who treated the deceased and who could have thrown much light on this aspect, has not been examined. Not only that but even the record pertaining to the treatment of the deceased has not been brought on record. Even from the report of the Serologist it appears that the Banyan put on by the deceased at the time of incident was blood stained and it was sent for examination to the Serologist. It shows that there was one cut like mark on the left side chest region of the Banyan. In the inquest panchnama also this fact is indicated. It states that there is a hole on this portion of the Banyan. Thus, the matter is doubtful and its benefit should go to appellant. In view thereof, we

have reasonable ground to believe that only one blow was inflicted by the appellant on the deceased.

5.1. The post mortem notes as well as evidence of Dr. Mohamed Ilyas Iasqumohmed Shaikh P W 8 Exh. 21 show that the deceased had died on the 4th day of the incident and that too due to septicemia. In the cross-examination by the defence he has admitted that the cause of death was the septic condition developed by the patient. The post mortem notes further show that so far the heart is concerned, there was no damage caused to its outer cover i.e. pericardial. In the aforesaid circumstances and in view of the medical evidence, it appears to us that the conclusion drawn by the trial Court holding the appellant guilty of committing an offence under section 302 of the IPC is erroneous. When the offence has been committed in the circumstances which show that there was no premeditation, just before causing of the injury there was some exchange of words between the appellant and the deceased and only one blow was inflicted by the appellant would indicate that he did not entertain any intention to cause death of the deceased. It may here be noted that when the deceased was alive and admitted in the hospital after the assault, the police had registered the offence under section 326 of the IPC only and not under section 307 of the IPC. Thus considering overall circumstances on record, it appears to us that there was no intention on the part of the appellant to cause fatal injury to the deceased and cause his death. However, considering the fact that the appellant had used dangerous weapon and had chosen portion just below the left nipple, he is at least presumed to have knowledge of his act. He would have at least anticipated that by his such act he might cause death of somebody or of the person to whom he was about to inflict the injury. If that be so, the offence would squarely stand covered under Part-II of section 304 of the IPC. We do not agree with the submission of Mr. Kodekar that since he appeared to be a habitual offender it should be presumed by the Court that he did have intention to cause the death of the deceased more particularly when he was armed with deadly weapon like knife. However, that is not the sole criteria to decide the nature of offence. May be that it is one of the important factors to be kept in view while giving decision, but there is also no evidence to show that he was habitual offender. The facts and circumstances described above by us clearly show that no such intention could have been there on the part of the appellant at the time of incident. He can be, at the most, saddled with the knowledge of his act. We, therefore, alter the conviction of the appellant from section 302 of the IPC

to one under section 304 Part-II of the IPC. As a consequence thereof, the sentence of life imprisonment is also converted into one for a period of five years' rigorous imprisonment while maintaining the sentence of fine as it is. We also confirm the conviction for offence under section 504 of the IPC and the sentence awarded by the trial Court.

In the result, this appeal is partly allowed. Muddamal articles to be disposed of in accordance with the direction of the trial Court.

In view of the above, Criminal Misc. Application does not survive and it is disposed of accordingly. Notice discharged.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

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